UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MV TRANSPORTATION, INC.

and Case 28–CA–145067

LANITA BURGOS, an Individual

Judith E. Davila, Esq., for the General Counsel.

Kerry S. Martin, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, PC), of Phoenix, Arizona, for the Respondent.

DECISION

CHARLES J. MUHL, Administrative Law Judge. The General Counsel's complaint in this case principally alleges that MV Transportation, Inc. discharged its employee, driver Lanita Burgos, on January 2, 2015, for her union and protected concerted activity. The employer counters that it terminated Burgos for insubordination. The contract covering the bargaining unit including Burgos defines insubordination as "the refusal and/or failure to follow a direct order." On December 30, 2014, Burgos was advised by dispatchers not once, not twice, but three times in the span of 30 minutes that she needed to meet with a supervisor. She ignored the first two notifications. After the third, Burgos asked the dispatcher "[c]ould you please let Victoria [the supervisor] know she needs to contact the NAACP to have an appointment with me?" When Burgos was then told the meeting was for company business and her refusal to meet with her supervisor may be deemed insubordination, Burgos left work. As discussed fully herein, I find that Burgos engaged in protected activity at different points between January and November 2014. This included filing written complaints with her employer alleging mistreatment by employees and supervisors; discussing workplace complaints with coworkers; filing an EEOC charge alleging racial discrimination by the company; and having a grievance filed to challenge a suspension. Nonetheless, I conclude MV Transportation, Inc. had no animus towards this protected activity and discharged Burgos for her unprotected insubordination.

STATEMENT OF THE CASE

On January 26, 2015, Lanita Burgos (the Charging Party) initiated this case by filing the original unfair labor practice charge in Case 28–CA–145067 against MV Transportation, Inc. (the Respondent). On November 29, 2017, the General Counsel, through the Regional Director for Region 28 of the National Labor Relations Board (the Board), issued a complaint against the Respondent. The complaint alleges the Respondent independently violated both Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by taking multiple adverse actions against Burgos due to her protected concerted and union activity. The actions include: issuing a notice of infraction to Burgos on December 31, 2014; suspending Burgos on that same date; and discharging Burgos on January 2, 2015. On December 12, 2017, the Respondent filed an answer to the complaint, denying the substantive allegations. From February 20 to 22, 2018, in Phoenix, Arizona, I conducted a trial on the complaint.

On the entire record and after considering the briefs filed by the General Counsel and the Respondent on April 12, 2018, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent provides local transportation services to passengers in Phoenix, Arizona. In conducting its business operations during the 12 calendar months ending January 26, 2015, the Respondent purchased and received, at its facility in Phoenix, goods valued in excess of $50,000 directly from points outside the State of Arizona. During the same time period, the Respondent earned gross revenues in excess of $250,000. Accordingly, and at all material times, I find that the Respondent, as it admits in its answer, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction. I also find, as the Respondent admits, that the Amalgamated Transit Union, Local Union 1433, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Pursuant to a contract with the City of Phoenix, the Respondent provides transportation to elderly and disabled persons. Among others, the Company employs bus drivers, window dispatchers, and radio dispatchers to do so. Since June 2007, and as of the date of the trial in this case, Lanita Burgos worked as a driver. The material events occurred from January 2014 to

September 2015.[1] During that time period, Clark Hart was the general manager in Phoenix; Heidi Heath was the operations manager; Kenneth Ming was an accounts manager; and Victoria Hensley was the safety and training manager. The Union represents certain employees at the Respondent's Phoenix facility, including drivers and dispatchers. Sometime in 2011, Burgos became a member of the Union.

The Respondent presently employs approximately 180 drivers. After reporting for work and clocking in, drivers check in with a window dispatcher to obtain their trip manifests and vehicle keys. The manifest contains a list of people the driver must pick up and drop off that day, including the specific times for doing so. Drivers then must "pre-trip" their vehicles to insure they are safe to take out on the road. The Respondent requires pre-tripping to be completed within 12 minutes of the start of a driver's shift. Once drivers leave the facility, radio dispatchers communicate to them any changes to their trip manifests over two-way radios. A driver's trip manifest and any changes to it also appear on a "mobile data terminal" (MDT), or screen display, in the vehicle. Each day, matching drivers to passenger routes is a big puzzle requiring frequent changes to each driver's manifest. The Respondent also affords employees, including drivers and dispatchers, the ability to write up incident reports documenting any unusual occurrences during a workday. Drivers submit such reports to a window dispatcher, who then gives each report to the appropriate supervisor.

In its fleet of vehicles, the Respondent utilizes "DriveCam" to insure its drivers are driving safely. DriveCam is a monitoring device which constantly tracks the operation of a vehicle. When a vehicle engages in an unnatural movement generating a certain amount of force, DriveCam is triggered and will record a 20-second video clip with sound. The video shows 10 seconds before the triggering event and 10 seconds after it. When a driver returns to the yard, any video clips are downloaded. The Respondent's DriveCam policy[2] applicable to unit employees states: "All DriveCam events will be reviewed and evaluated for compliance with the company's policies and defensive driving standards. Drivers found acting in an improper and/or unsafe manner shall be coached towards behavior improvement and if necessary retrained and/or disciplined." The policy calls for daily review of DriveCam events and daily counseling of drivers involved in those events. Depending on the number and severity of events, the policy sets forth potential progressive discipline for drivers. In 2014, Safety Manager Hensley was responsible for reviewing clips of risky driver behavior each morning. If Hensley felt that an employee needed to be coached, she would contact the union steward working that day, have the steward review the clip, and then set up a time to review the video with the driver. Hensley then provided the window dispatcher with a list of drivers

[1] I take administrative notice of the Board's docket report for this case. *Farmer Bros. Co.*, 303 NLRB 638, 638 fn. 1 (1991) ("The Board may take administrative notice of its own proceedings."). The docket report shows that, on March 30, 2015, the General Counsel deferred Burgos' unfair labor practice charge to the grievance and arbitration procedure contained in the contract between the Respondent and the Union, pursuant to *Collyer Insulated Wire*, 192 NLRB 837, 839–843 (1971). Despite the grievance being resolved with a settlement in September 2015, the General Counsel did not revoke the deferral until September 19, 2017. No explanation for the delay was provided at the hearing.

[2] R. Exh. 8.

she needed to see and the dispatcher passed along that information to each driver. The dispatcher did not provide any information regarding the purpose of the meeting with Hensley. The Respondent has utilized this process since it implemented DriveCam in 2007.

B. Relevant Contract Provisions

The material collective-bargaining agreements between the Respondent and the Union run from July 1, 2011 through June 30, 2014, and then from July 1, 2014 through June 30, 2019.[3]

Article 14, Section 2 of both agreements requires all disciplinary action imposed by the Respondent on a non-probationary employee to be based on "just and sufficient cause." The same article lists "serious infractions," which the parties agreed were just cause for the discharge of an employee. The list includes insubordination in both contracts. In the current agreement, the parties defined insubordination to include "the refusal and/or failure to follow a direct order, provided that no direct order may be given that violates the terms of this Agreement." Both agreements also state that the Respondent may impose a lesser penalty than discharge for serious infractions, at its sole discretion. When seeking to discipline an employee, the Respondent is required by the current contract to issue a "notice of infraction" (NOI) to the employee and send a copy to the Union. The NOI is a written description of the allegations to the employee. It must be issued no later than 5 business days after the alleged infraction. The Respondent then must schedule a "fair and impartial hearing." If the Respondent wishes to impose discipline, the employee must attend that hearing. The hearing also must be held within 7 days of the NOI. The Respondent must decide at the conclusion of the hearing whether it is disciplining the employee. In addition, Article 2, Section 6 of the current agreement states: "When requested by the employee, there shall be a Union Official present whenever the Company meets with the employee about discipline. If the Union Official is unavailable, the meeting or interview shall not begin until the Union Official is present."

The parties also included anti-discrimination provisions in each collective-bargaining agreement. Article 2, Section 1 of the current agreement states:

> The Company and the Union each agree that it will not unlawfully discriminate against any individual with respect to hiring, promotion, discharge, compensation, conditions and privileges of employment nor will it limit, segregate or classify employees so as to unlawfully deprive any individual of employment opportunities because of such individual's race, color, religion, sex, sexual orientation, gender identity, national origin, age, disability or any other protected status under Federal, State, and local laws.

[3] GC Exhs. 18 and 19.

Finally, Article 3 addresses cooperation. Section 3D states that "all employees shall treat each other with respect and offer full support in the performance of their duties." Section 3G contains the parties' agreement that "they will treat one another's representatives with dignity and respect, and that employees and supervisors and other members of management will treat each other with dignity and respect."

C. Burgos' Written Complaints to the Respondent from January to June 2014

In January 2014, Burgos submitted two written complaints, or incident reports in the Respondent's vernacular, concerning confrontations she had with other employees.[4] The first, dated January 6, was entitled "Harassment, Hostile Work Environment, Assault." Burgos described how driver Maria Dominguez twice told Burgos she was aware of rumors Burgos and fellow driver Tanya Thomas were spreading about her. Burgos also wrote that two supervisors, including Hector Perez, heard Dominguez's statements, but neither took any action against Dominguez. Burgos stated in the complaint that, after reporting what happened to Hart, he told Burgos, if she had nothing nice to say, she should say nothing at all and that Hart would speak to Dominguez. Burgos also alleged that Dominguez pushed a door into her hand. Window dispatcher Veronica Lomeli then called Burgos a troublemaker, to which a supervisor in the area again did nothing. The second written complaint, dated January 11, was entitled "Rude/Verbally Abusive and Inappropriate Behavior Towards a Driver." In it, Burgos detailed another incident with Lomeli. Burgos claimed Lomeli falsely stated Burgos told her she was coming in early from her route, after which Lomeli attempted to get Burgos to leave work prior to the end of her scheduled shift and not be paid for the remaining time. Burgos submitted both written complaints to window dispatch to be passed on to supervisors. Burgos also provided copies of the complaints to the Union and to Reverend Oscar Tillman, a representative of the local chapter of the National Association for the Advancement of Colored People (NAACP). Burgos, who is black, gave the complaints to the NAACP, because she felt her coworkers' conduct towards her was racially motivated. However, Burgos did not include that claim in the written complaints. Burgos spoke to coworker Thomas, who also is black, and told her about the issues Burgos was having. At some point that same month, Hart met with Burgos and a union representative to discuss Burgos' complaints about Dominguez.

On May 1, Hensley issued Burgos a good driving award for "demonstrating extraordinary skill and sound judgment while navigating a fleet vehicle on the day of April 23, 2014."[5]

Burgos submitted her next written complaints to the Respondent later in May and in June.[6] In the first complaint dated May 21, Burgos described another confrontation with Lomeli over whether Burgos had parked her vehicle in a proper location. Burgos stated that a road supervisor was present when the discussion took place. In the second complaint dated June 12,

[4] GC Exhs. 3 and 4. All dates hereinafter are in 2014, unless otherwise specified.

[5] GC Exh. 17.

[6] GC Exhs. 6 and 7.

Burgos detailed how Lomeli questioned her about why she was late returning to the yard and why Burgos had not advised Lomeli she would be late. Burgos then described how she reported the conflict to a road supervisor and, when Lomeli saw her speaking to him, Lomeli screamed repeatedly at Burgos that Burgos was disrespecting Lomeli by doing so. At some point in this discussion, Burgos asked the road supervisor if Burgos was being treated that way because of the color of her skin. Ultimately, Burgos requested that the road supervisor call Operations Manager Heath and report what happened. She also wrote in this complaint that she had spoken to Reverend Tillman at the NAACP and he indicated he would talk to Hart.

The next day, June 13, Heath met with Burgos and Lomeli. Heath reviewed with them the provision in Article 3 of the collective-bargaining agreement requiring employees to treat each other with respect and offer full support in the performance of their duties. Heath also told Burgos that, when she was the closing driver, she needed to call in to dispatch when she returned to the yard at the end of her shift. (This would allow the dispatchers to begin closing down their operations for the day.) At the end of the meeting, Burgos and Lomeli hugged.[7]

During that same month, Burgos expressed to Hensley an interest in becoming a "behind-the-wheel," or driver, trainer. The position carried with it an hourly wage increase. Hensley did not take any action at that time. When Burgos later observed drivers, including Dominguez, with less seniority than her acting as trainers, she asked Hensley about it again. Hensley told her she needed to take a class to become a trainer and Hensley was looking for "fresh meat."[8]

Also during the summer of 2014, Burgos discussed her racial discrimination allegations with Thomas. They talked about the difference between how black women were being treated in comparison to other employees. They also discussed mistreatment by supervisors and dispatchers. Eventually, the two met with Reverend Tillman and shared their concerns. They also discussed with Tillman the possibility of filing charges with the Equal Employment Opportunity Commission (EEOC).

[7] Both Heath and Burgos testified concerning what occurred during this meeting. (Tr. 51–52, 269–271.) To the extent any contradictions exist, I credit Heath's testimony, because it was corroborated by a contemporaneous email she sent to the Union describing what occurred. (R. Exh. 5.)

[8] I credit Burgos' testimony in this regard, over Hensley's denial. (Tr. 52–54, 114–117, 361–362.) Thomas provided corroboration when she testified that Burgos contemporaneously reported the "fresh meat" comment to her. (Tr. 186.) In addition, I found Burgos' frankness on this point, as well as her demeanor, to be indicative of reliable testimony. Burgos stated that, while she did not think Hensley's comment was appropriate, she did not really understand it and did not think it was racial discrimination. I also find this conversation occurred in June 2014. Although Burgos stated in her affidavit submitted during the investigation of her charge that the conversation took place in March 2014, she testified at the hearing that it occurred in the same timeframe as her June 12 written complaint. That timeframe is corroborated by the text of a subsequent charge Burgos filed with the EEOC, which stated the conversation occurred in or around June 2014. (GC Exh. 10.)

D. Burgos' Filing of a Discrimination Complaint with the EEOC in August 2014

Every 30 days, the Respondent's corporate safety department prepares a report using DriveCam of the "100 Riskiest Drivers." The report covers the region which includes the Phoenix facility. The Respondent posts this monthly report in the drivers' area, with the drivers names redacted. In July 2014, Hensley participated in a DriveCam call, where other division representatives of the Respondent discussed an alternate approach. The representatives described how they posted the list without redacting the drivers' names and how the public pressure resulted in improved driving performance. Hensley thought she would give it a try and, sometime after July 26, she posted the list showing the drivers' names.[9] Hensley did not give it much thought before doing so. The list showed 16 drivers from Phoenix, including Burgos as the 16th riskiest driver that month. Three other Phoenix drivers appeared in the top 10. Some of the listed drivers, including Burgos, were none too happy that their names were posted for everyone to see. When Heath became aware of what Hensley had done, she immediately had the list taken down. Burgos asked a fellow driver if anything like that had been done before and the driver responded no. She also spoke about it with Thomas, who told her to report the list posting to the NAACP.

On August 5, Burgos met with Dispatch Manager Larry Quilen concerning her alleged failure to show for a scheduled shift on July 31. Quilen showed her an MDT printout indicating she replied yes to a July 30 inquiry as to whether she could work the next day.[10] He also told Burgos she said yes to the shift to him both on a cell phone call and over the radio. Burgos denied accepting the shift, telling Quilen she would have shown up if she had committed to doing so. The Respondent gave Burgos two attendance points for a no-call/no-show.

On August 6, Union President Bob Bean sent an email to Hart, Heath, Hensley, and Ming advising them that Burgos was appointed a steward-in-training. However, subsequent to the notification, the Union never trained Burgos to be a steward and Burgos never performed any steward activities.

Burgos' last written complaints to the Respondent came shortly thereafter.[11] First, on August 7, Burgos submitted an incident report describing the posting of the 100 Riskiest Drivers list. She stated she overheard other drivers talking about the posting. She also described her conversation with Quilen concerning her alleged no-show. She noted she had to take leave under the federal Family and Medical Leave Act (FMLA) after her meeting with Quilen. She also detailed a DriveCam meeting she had with Hensley on August 1. Burgos stated that Hensley showed her a video clip and said she ran a stop sign. Burgos denied it and suggested the camera was not working properly. Burgos also referenced the prior written complaints she submitted to the Respondent concerning Lomeli. She asserted the Respondent's conduct was "an ongoing form of retaliation because I've been standing up for myself."

[9] R. Exh. 7.

[10] R. Exh. 6.

[11] GC Exhs. 5 and 9.

Also on August 7, Burgos' coworker Thomas filed a charge against the Respondent concurrently with the EEOC and the Civil Rights Division of the Arizona Attorney General's Office (AAG). The charge alleged the Respondent retaliated against Thomas for an earlier complaint of discrimination she filed against the Company in April 2013. The charge alleged two adverse actions by the Respondent. First, Thomas claimed the Respondent assigned her to more late runs, resulting in her getting off later than scheduled. Second, Thomas alleged the Respondent changed her route, so that she had to pick up more passengers in wheelchairs. Burgos was aware that Thomas filed this charge.

Burgos' final complaint, dated August 11, detailed an incident which allegedly occurred almost 4 months earlier on April 24. Burgos stated that both she and Lomeli arrived late to a safety meeting. Manager Hector Perez wrote down that Burgos was late, but did not say anything to Lomeli. Burgos wrote that Perez was retaliating against her for her earlier complaint (the first one in January), in which she described how Perez did nothing when Dominguez was harassing Burgos. The August 11 complaint was titled "Discrimination, Retaliation." This was the first time in a written complaint that Burgos used the word "discrimination."

In total, Burgos submitted six written complaints to the Respondent from January to August 2014. She talked about certain of the incidents detailed in the complaints, as well as the mistreatment of drivers by radio dispatchers, with at least three other drivers, including Thomas. However, Burgos never discussed taking group action with any of her coworkers.[12]

Via letter dated August 15, the Respondent notified Burgos of its approval of her intermittent leave request under the FMLA, due to a serious health condition.[13] The letter stated that, pursuant to her doctor's certification, Burgos could be off three times per month for 1 day per episode. Burgos' ability to take intermittent FMLA leave ran from August 14, 2014 to August 14, 2015.

Then on August 21, Burgos also filed a charge against the Respondent with the EEOC and AAG (the EEOC charge).[14] The complaint alleged the Respondent discriminated against Burgos because she was black, as well as retaliated against her for complaining about the discrimination. Burgos alleged the discrimination took place from April 24 to August 5 and continuing. The text of the complaint listed the following as discriminatory actions: 1) Perez writing down Burgos, but not Lomeli, as late to the safety meeting on April 24; 2) Hansley denying Burgos the opportunity to be a trainer and instead choosing a Hispanic employee with less seniority in June; 3) Manager "Andre" telling Burgos to "suck it up" after she complained to him about unequal treatment due to her race that same month; 4) dispatch not scheduling

[12] Tr. 36–41, 45, 47, 174. The record testimony is lacking as to what Burgos specifically discussed with her coworkers, the timing of these discussions, and how the discussions tied in, if at all, to Burgos' submission of her written complaints.

[13] GC Exh. 27.

[14] GC Exh. 10.

Burgos' breaks appropriately; 5) the posting of the "100 Riskiest Drivers" list with Burgos' name on it; and 6) Quilen assessing Burgos attendance points for the no-call/no-show on July 31. Based on her discussion with an intake officer when filing the charge, Burgos understood that she should not meet, on her own, with any supervisors she had accused of misconduct.[15] The Respondent received a copy of Burgos' EEOC charge and Heath was aware Burgos filed it. Ultimately, the EEOC dismissed the charge.[16]

On September 26, Heath met with Burgos and Union Representatives Dwayne Session and Ken Buchholz about Burgos' EEOC charge and other complaints. The meeting came about after Kenneth Chiang, then the Respondent's human resources director, emailed Heath and advised her that Burgos told manager Perez she had been directed not to speak with Perez since she filed charges against him and others. Chiang also stated he told Burgos "we respect the employee's right to file charges with outside agencies but that we should be able to continue [to] communicate with her about business matters." At the meeting on the 26th, the attendees discussed Burgos' alleged no-call/no-show on July 31. Heath agreed to remove the two attendance points which Burgos was assessed. They then discussed Burgos' refusal to speak to Perez. Session stated that the EEOC informs people who file complaints with it to have as little contact as they can with the persons named in the complaint. Heath responded that would not always be possible, to which Burgos then said she would not speak to anyone without a union representative present. Heath told her one would be provided, if she requested it.[17]

---

[15] I credit Burgos' testimony in this regard, which was corroborated in part by Heath when she testified that Burgos expressed to her a desire not to meet with management on her own. (Tr. 117–120, 220.) In its post hearing brief, the Respondent argues I should draw an adverse inference and not credit the testimony, because the General Counsel did not call the intake officer who allegedly gave this instruction to Burgos. I decline to do so. An adverse inference is not warranted against a party, where it cannot reasonably be assumed that the missing witness would be favorably disposed to that party. *Continental Auto Parts*, 357 NLRB 840, 842 fn. 12 (2011); *Queen of the Valley Hospital*, 316 NLRB 721, 721 fn. 1 (1995). Although acknowledging this standard, the Respondent offers no explanation for why an EEOC intake officer should be presumed favorably disposed to Burgos or to the General Counsel. Indeed, no such reason is obvious.

[16] At the hearing, I rejected, as a General Counsel exhibit, the EEOC charge filed by Thomas. (Tr. 191–198; GC Exh. 25.) I now reverse my prior ruling and admit GC Exhibit 25 into the record. I initially determined that Thomas' EEOC charge should not be admitted, due to the lack of discussion and coordination between her and Burgos following their meeting with Reverend Tillman and prior to filing the charges. This included Thomas testifying that she did not advise Burgos to file her own charge and did not tell Burgos after Thomas filed her charge. (Tr. 179.) Nonetheless, and however limited it may be, the testimony the two did offer is sufficient to establish they discussed filing EEOC charges with Reverend Tillman sometime in July 2014, and then followed through on that by individually filing charges within the same timeframe in August 2014. (Tr. 61, 175–179.) While the connection may be tenuous, it is sufficient to establish relevancy to the question of whether the employees were engaged in protected concerted activity. See *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 948–950 (1981) (five individuals who independently filed EEOC charges were engaged in protected concerted activity, in part because the charges were filed close in time to one another).

[17] I credit Heath's testimony concerning this meeting, which was based on a contemporaneous email she wrote documenting what occurred. (Tr. 209–211; GC Exh. 28.) Burgos could not recall the meeting when testifying. (Tr. 78–79.) Session testified, but not about this meeting. (Tr. 152–171.)

On October 1, the Respondent sent Burgos a "Safe Driving Recognition" letter, in which she was commended for having driven for 7 years without an accident.

E. The Respondent's November 2014 Discipline of Burgos

On November 10, the Respondent issued Burgos written discipline and a 3-day suspension for violating its cell phone use policy. At the time, the policy prohibited drivers from using a cell phone while operating a company vehicle. For the first violation, it called for a 3-day suspension. The Respondent maintained and applied the policy to bargaining unit employees, pursuant to the management rights clause in the collective-bargaining agreement. The Respondent based this discipline on a DriveCam video clip of Burgos' vehicle containing audio of music being played, despite buses not having a radio. On that same date, Heath scheduled a meeting with Burgos to discuss the discipline. Union Steward Hawkins told Burgos that she needed to go speak to Heath. However, Burgos left the office without doing so, after Kenneth Ming told her he had not heard anything about the meeting. On November 11, the Union filed a grievance challenging the discipline. On November 19, Heath met with Frank Zuckerbrow, then the vice president of the Union, to discuss the grievance. Heath offered to reduce the discipline from a 3-day suspension to a written verbal warning. On November 21, the Union accepted the offer and closed the grievance. On November 26, Burgos submitted a written complaint to the Union, objecting to its settlement of the grievance.[18]

F. The Respondent's January 2, 2015 Discharge of Burgos

The events leading to the Respondent's discharge of Burgos all occurred on December 30. On that date, Hensley provided window dispatcher Daniel Garcia with a list of employees she needed to meet with concerning DriveCam events. The list included Burgos. Shortly after Burgos arrived for a shift beginning at noon, Garcia informed her that she needed to see

[18] I credit Heath's testimony that Burgos refused to meet with her to discuss the Respondent's cell phone policy, but find this occurred on November 10, not in September as Heath testified. (Tr. 228–230, 233–235; GC Exh. 34.) Heath did meet with Burgos in September and discussed the need for Burgos to meet with supervisors about work. However, that meeting was not about the cell phone policy. Rather, it was in response to Burgos' refusal to speak with Garcia concerning a uniform issue. (GC Exh. 28, p. 2.) As to the refusal to speak with Heath about the cell phone policy, Burgos admitted that she was scheduled to meet with Heath on November 10, but did not do so. (Tr. 64–65.) She also stated she never got to view the November 10 video clip. (Tr. 121.) Burgos detailed in her written complaint to the Union over the November cell phone discipline grievance how a union representative advised her she had refused to talk with Heath on November 10 and that was all she had to do. (GC Exh. 12.) Furthermore, Heath's notes of her grievance meeting with the Union concerning the cell phone discipline also state "Lanita Burgos refused to come upstairs on November 10." (R. Exh. 4.) Heath testified concerning her notes at the hearing, stating she could not recall the discussion of that issue at the meeting. (Tr. 266–268.) Although the record evidence is not entirely clear, I conclude it is sufficient to establish that Burgos did not meet with Heath as scheduled to discuss Burgos' alleged cell phone policy violation on November 10.

Hensley before she left on her run.[19] Burgos then went to perform her pre-trip. After completing her pre-trip, Burgos did not go to see Hensley.

Instead, Burgos called in to dispatch and communicated multiple times to Breana Ming, the radio dispatcher on duty.[20] At 12:12 p.m., Burgos checked in and informed Ming that she was "10-8," or back in service and ready to transport passengers. She also stated that her MDT had not booted up yet, meaning she could not access her passenger manifest in the vehicle. Ming responded "Go ahead and come back inside and see Victoria [Hensley]." Burgos responded "10-4," or copy/acknowledged.

The next discussion between Burgos and Ming occurred almost 20 minutes later, at 12:32 p.m. Burgos again told Ming her MDT was not booting. Three minutes later, she asked Ming to provide information on her calls, or rides, that day. Because of the 20-minute time gap since their prior communication, Ming thought Burgos already had met with Hensley. Thus, Ming provided Burgos with information on her first two rides. That discussion ended at 12:37 p.m.

Almost immediately thereafter at 12:40 p.m., Ming radioed Burgos again and said "Can you come back into the yard to see Victoria?" Burgos responded "copy." Three minutes later, Burgos called in and asked Ming, "[C]ould you please let Victoria know she needs to contact the NAACP to have an appointment with me?" Ming responded that she gave Burgos' message to Hensley and Hensley said that "it's Company business and if you don't come in and speak with her it would be considered insubordination." Burgos said "copy."[21]

Following the last communication, Burgos returned to the yard. She went to window dispatch and told Garcia she was taking FMLA leave. Burgos left the facility without seeing or speaking to Hensley.[22]

---

[19] Although Garcia did not testify at the hearing, Burgos acknowledged in her testimony that Garcia told her she needed to see Hensley before she left on her run. Tr. 82.

[20] Breana Ming is the daughter of Kenneth Ming, then the Respondent's accounts manager and, at the time of the hearing, its operations manager.

[21] In accordance with its normal practice, the Respondent recorded the communications between Burgos and Ming. At the hearing, a transcript of those communications, and their associated times, was entered into the record. GC Exhs. 30 and 31. The transcript of the radio communications between Burgos and Ming on December 30 is the best evidence of that conversation and I rely solely on that, not any witness testimony, concerning what each person said. *McAllister Bros.*, 278 NLRB 601, 601 fn. 2 (1986).

[22] As to what happened on December 30, I credit Breana Ming's testimony concerning the reason why she provided the call information to Burgos: her assumption that Burgos met with Hensley during the 20-minute gap in their communications. (Tr. 298–299.) That assumption was logical given the sequence of events and Ming's demeanor was trustworthy when providing the testimony. However, I do not find that Burgos, after returning to the yard, said to window dispatchers Garcia and Renee Newman that Hensley could write Burgos up for insubordination, because Burgos did not care. Neither Garcia nor Newman testified at the hearing. Instead, the Respondent introduced incident reports that each person completed on December 30, where they both stated Burgos made this comment. (R. Exh. 1, pp. 1–2.) I admitted the reports into evidence as business records under Federal Rule of Evidence (FRE) 803(6). (Tr. 246–252.) An argument can be made that Burgos' alleged statement as reported by Garcia and Newman

On December 31, Heath issued Burgos an NOI for insubordination/refusal to follow a safe and lawful work instruction.[23] The notice stated:

> On December 30, 2014 you were instructed to see Victoria Hensley, Safety Manager and Tiffany Hawkins, Union Steward, to review a Drive Cam clip. Upon refusal to meet with Victoria, you were informed that your actions could be considered insubordination. Your continued refusal to follow a directive that was work related is insubordination.

The Respondent placed Burgos on administrative leave, pending a hearing scheduled for January 2, 2015. On that date, the hearing went forward. Burgos offered no explanation for her refusal to meet with Hensley.[24] At the hearing conclusion, the Respondent discharged Burgos for insubordination. Hart and Heath made the decision. In the written report documenting the hearing result, which was created and signed off on by the Union and the Respondent that day, the Respondent described the insubordination as follows:

---

in the incident reports, although also hearsay, is an admission of a party opponent, because the Respondent introduced these records into evidence and Burgos is the charging party in this case. Cf. *Vencor Hospital Los Angeles*, 324 NLRB 234, 235 fn. 5 (1997) (discriminatees who are not charging parties are not "party opponents" under FRE 801(d)(2)). However, admitting those statements as substantive evidence would not alter the outcome of the case. As a result, I decline to do so. Finally, I do not find that Garcia informed Burgos of Union Steward Hawkins' availability to join the meeting with Hensley. Again, Garcia did not testify and Hensley's only testimony in this regard was to confirm that a union representative was present and available. (Tr. 355.) Even Hensley's contemporaneous account of what occurred that day states only that she told Garcia to let drivers know Hawkins was available, when he told them they needed to meet with her. (GC Exh. 2.)

[23] GC Exh. 13.

[24] I credit Heath's testimony concerning what occurred at the January 2 disciplinary hearing. (Tr. 231–232, 235–236, 253–254.) This includes that Burgos offered no explanation for her refusal to meet with Hensley; Heath wrote "unmanageable employee" on the written explanation at the end of the hearing because of the lack of an explanation; and Burgos' failure to explain her conduct did not factor into the discharge decision. I found Burgos' limited testimony on the meeting to be incredulous. (Tr. 87–88.) Burgos claimed that she was asked what happened between the time she left the yard and then returned, to which she responded "something had come up." Burgos then denied she was allowed to explain what had come up. She also alleged that Heath said "she wasn't too concerned about it anyhow." I find Heath's actions at the time, as well as her reliable demeanor when testifying about these events, to be indicative of someone who was extremely concerned about Burgos' conduct. Moreover, the entire purpose of this hearing was to explore what happened on December 30 and whether discipline was warranted. If the Respondent refused to allow Burgos to explain her conduct, certainly a union representative would have spoken up. Per Article 14, Section 3(d) of the parties' contract, the Union was required to present all information it believed supported its case at the hearing. (GC Exh. 19.) Session was at this meeting as a union representative, but did not testify about it at the trial. Thus, he did not corroborate Burgos' testimony that she was not allowed to explain what happened.

> On December 30, 2014, you were instructed three times to see Victoria Hensley for Drive Cam counseling. It was made known to you that there was a Union Steward present, and to refuse to meet with Victoria would be considered insubordination. This meeting was Company related in compliance with our CBA and instruction to meet with the Safety Manager was a lawful and safe directive. Your failure to comply with a direct order is in violation of the CBA…

The report then listed the insubordination description in the "serious infractions" provision of the contract. At the bottom of the report, Heath wrote in the following as the Respondent's position: "Separate employment based on insubordination and unmanageable employee."[25]

Following Burgos' discharge, the Respondent produced an internal "Employee Separation Report."[26] In that report, the Respondent again stated its basis for the termination:

> On December 30, 2014, Lanita was instructed 3 times to meet with the Safety Manager for DriveCam review. She refused to do so and was so instructed that her refusal would be considered insubordination. She turned in her keys and manifest and left the property. The first time she did this, in September of this year we needed to review a DriveCam of her violating our Cell phone policy and she refused to meet with us, we instructed her that she needed to follow direct lawful and safe orders from management personnel.[27]

On December 30, Hensley received a total of 15 DriveCam event reports, including the one for Burgos. She met with all 13 other drivers involved in those events. Hawkins was present as a union representative for all of those meetings and signed off on a printed DriveCam event review for each employee. From June 30 to December 8, different supervisors coached Burgos about DriveCam events on eight occasions. Hensley was the supervisor for four of those coachings and three of those meetings with Hensley occurred after Burgos filed her EEOC charge.[28] Prior to Burgos' refusal to meet with Hensley on December 30, neither

[25] GC Exh. 15.

[26] GC Exh. 34.

[27] As described above, I have concluded that Burgos refused to speak with Perez in September and refused to meet with Heath to discuss the cell phone policy in November. The statement in the employee separation report that the cell phone policy refusal occurred in September is erroneous.

[28] The Respondent introduced into evidence a report from DriveCam showing all of the events involving Burgos from June 30 to December 30. The report contains a "status" column, which shows when one of the events resulted in a coaching of Burgos by a supervisor. When Hensley was the one who conducted the coaching, the report showed "VICTORIA," next to the date entry. (R. Exh. 11; Tr. 350–354.) Burgos attended these DriveCam coachings with a union steward present. (Tr. 120–123, 146.)

Heath nor Hensley ever had an employee refuse to meet with them. Heath also never had to discipline an employee for insubordination. Other than Burgos' discharge, the Respondent did not issue any discipline to employees for insubordination from January 1, 2013 to July 1, 2015.

At no point subsequent to the January 2, 2015 disciplinary hearing did Burgos ever explain where she was on December 30 from the time she left the yard to when she returned and went home.[29]

G. The Respondent Agrees to Reinstate Burgos

On January 5, 2015, the Union filed a grievance contesting the Respondent's discharge of Burgos. The grievance alleged Burgos was never informed she needed to see Hensley immediately or why she needed to see Hensley. It also claimed Burgos never was informed what the consequences would be, if she did not meet with Hensley. The Respondent denied the grievance at step 2. The written denial noted the Union's arguments that Hensley never informed Burgos directly that she needed to meet with Hensley, as well as that the request was informative rather than a direction in light of the dispatcher giving Burgos keys to her vehicle and a trip manifest. In rejecting the arguments, the Respondent stated that notifications of the type Hensley made to Burgos were "commonplace" and made by all the managers at the division. The matter then was set for arbitration.

In September 2015, prior to that arbitration, the parties settled the grievance. Pursuant to the settlement, the Respondent reinstated Burgos to her job with no backpay. She was placed on a last-chance agreement for 1 year, during which she was subject to immediate discharge with no resort to the grievance procedure for any "serious infractions" as defined in the parties' contract. That 1-year period passed without the Respondent issuing any discipline to Burgos. As previously noted, at the time of the hearing in this case in February 2017, Burgos remained employed by the Respondent.

[29] I do not credit Burgos' explanation as to why she failed to return to the yard and meet with Hensley on December 30. (Tr. 88.) When Burgos was asked this question at the hearing, she claimed she tried unsuccessfully to get through on the radio to acknowledge she needed to return to the yard. The transcript of the communications between Burgos and Ming belies this testimony. First, Ming told Burgos, before she left the yard and encountered any alleged problem with radio communication, to "[g]o ahead and come back inside and see Victoria." Burgos already had been told by Garcia to do the same thing. Then Burgos went radio silent for 20 minutes. If she had been trying to get through on the radio unsuccessfully, the expected response when she finally did reach Ming would have been to so state. Instead, she asked Ming for her pick-ups, without saying anything about not yet having met with Hensley. Moreover, Burgos never mentioned during the communications, or any time thereafter during the disciplinary process, having a problem reaching radio dispatch. The bottom line is that Burgos was gone from the yard for 30 minutes and has not provided a plausible explanation, either then or now, as to what she was doing during that time.

H. Witness Credibility

In addition to the specific credibility determinations made above, I now address the overall credibility of witnesses at the hearing. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014). Demeanor evidence refers to non-verbal cues given by a witness while testifying, including the expression of countenance, how the witness sits or stands, whether the witness is inordinately nervous, coloration during critical examination, and the modulation or pace of speech. *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078–1079 (9th Cir. 1977).

Overall, I found that Heath, Breana Ming, and Hensley exhibited a stronger recollection of what occurred in this case and greater clarity in describing the details they remembered, despite the time that has passed since the material events. I also found them to be forthright concerning what they could not remember. These factors, as well as their demeanors on the witness stand, enhanced their overall credibility. In contrast, both Burgos and Thomas struggled to remember specifics of the material events here. They also frequently provided non-responsive, inconsistent, or unclear answers to questions. Most of Burgos' direct examination was conducted with leading questions that suggested answers to her. At times, when answering questions from the Respondent's counsel, Burgos became argumentative and/or her voice tone increased. Finally, and most notably, Burgos repeatedly paused, at times for exceedingly long periods, before responding to questions, particularly during cross examination. These factors suggested unreliable testimony. Thus, I credit the testimony of Heath, Breana Ming, and Hensley, where any contradictions in testimony exist that have not been addressed above.

ANALYSIS

The General Counsel's complaint alleges the Respondent issued Burgos a notice of infraction, suspended her, and discharged her for her protected concerted activity, in violation of Section 8(a)(1), and for her union activity in violation of Section 8(a)(3).

As to the 8(a)(1) allegations, the General Counsel asserts two legal theories. The first is that the conduct which the Respondent relies upon to justify the adverse actions—Burgos' refusal to meet with Hensley on December 30 without a representative of the NAACP present—was protected concerted activity and was not conduct so egregious as to lose the Act's protection. See *Atlantic Steel Co.*, 245 NLRB 814 (1979). The second theory is that the discharge violates Section 8(a)(1) under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under either theory, the initial question to be addressed is whether Burgos engaged in protected concerted activity and, if so, to what specific activities the Act's protection applies.

I. DID BURGOS ENGAGE IN PROTECTED CONCERTED ACTIVITY?

A. Legal Framework

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" [of the Act]. 29 U.S.C. § 158(a)(1). Rights guaranteed by Section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." 29 U.S.C. § 157. "[A] respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is 'motivated by the employee's protected concerted activity.'" *CGLM, Inc.*, 350 NLRB 974, 979 (2007), quoting *Meyer Industries (Meyers I)*, 268 NLRB 493, 497 (1984).

The "mutual aid or protection" clause guarantees employees the right to act together to better their working conditions. *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). In order to find an employee's activity to be "concerted," the conduct must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity includes those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Meyers II*, 281 NLRB at 887. Moreover, while no group action may have been contemplated, activity by a single individual is concerted, where the concerns expressed by the employee are a logical outgrowth of concerns previously expressed by a group. *Summit Regional Medical Center*, 357 NLRB 1614, 1617 fn. 13 (2011); *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991).

In addition to the traditional protected concerted activity described above, an individual's assertion of a right grounded in a collective-bargaining agreement is protected concerted activity, even where the individual is acting alone. *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). When asserting the right, an employee need not be correct that a breach of the collective-bargaining agreement has occurred. *Yellow Transportation, Inc.*, 343 NLRB 43, 47 (2004). The activity is concerted if the employee honestly and reasonably invokes rights which have been collectively bargained. Id. The employee likewise need not file a formal grievance, invoke a specific provision of the contract, or even refer to the contract. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. at 839–840.

B. Burgos Engaged in Interboro and Traditional Protected Concerted Activity

Before applying this framework here, a summary of Burgos' 2014 activity is warranted. From January to August, Burgos submitted six incident reports to the Respondent, all stating her own individual complaints. The bulk of those complaints centered on altercations Burgos

had with coworkers Dominguez and Lomeli. She also complained that supervisors observed, but ignored, these altercations or did nothing in response to her reporting them. She twice mentioned the possibility of the conduct constituting racial discrimination, first in the text of her June 12 complaint and then in the title of her August 11 complaint. She also complained about the Respondent's posting of the 100 Riskiest Drivers list. As to her discussions with other employees concerning these complaints, Burgos spoke with Thomas about potential racial discrimination and certain of the incidents she wrote about in her reports. She also discussed mistreatment by dispatchers and the possibility it was motivated by race with other drivers. She spoke to Thomas and another driver about the posting of the 100 Riskiest Drivers list. She and Thomas spoke to Tillman and discussed the possibility of filing EEOC charges. In August, Burgos individually filed her EEOC charge alleging racial discrimination and retaliation. Then in November, the Union filed a grievance on her behalf, alleging the Respondent did not have just cause to discipline her for a cell phone policy violation.

Applying these facts to the Board's *Interboro* standard, I find Burgos engaged in protected concerted activity when she filed her EEOC charge, submitted her written complaints, and filed the grievance challenging her suspension for violating the cell phone policy. As to the EEOC charge, the contract between the Respondent and the Union prohibited the company from discriminating against employees based on their race. Burgos' charge alleged the Company took multiple adverse actions against her, because she is black. By filing the charge, Burgos was insisting on rights contained in the contract and acting in the interest of all employees covered by the agreement. *King Soopers, Inc.*, 222 NLRB 1011, 1018 (1976) (employee who filed charges with the EEOC and Colorado Civil Rights Commission alleging a failure to promote due to ethnicity was engaged in *Interboro* protected concerted activity, where collective-bargaining agreement required employer to fully comply with all laws regarding discrimination); *U.S. Postal Service*, 245 NLRB 901, 902–903 (1979) (filing of racial discrimination complaints with Postal Service's Equal Employment Opportunity branch was *Interboro* protected concerted activity, where collective-bargaining agreement prohibited such discrimination). Regarding her six written complaints, the parties' contract required all employees to treat each other with "dignity and respect." In each of her complaints, Burgos detailed alleged mistreatment of her by supervisors and other employees. Although she never filed a grievance, the mistreatment she wrote about invoked and arguably breached the contract provision. Indeed, Heath discussed this very provision at the June 13 meeting with Burgos and Dominguez in an attempt to resolve their conflicts. Finally, as to the grievance filing, the collective-bargaining agreement contains a provision requiring discipline to be for just cause. In addition and pursuant to the management rights clause, the Respondent maintained the cell phone policy and applied it to unit employees. By filing the grievance, the Union and Burgos were contesting whether the Respondent had just cause to find she violated that policy. She was asserting a contract right by doing so. *Vanport Sand and Gravel*, 270 NLRB 1358, 1358 fn. 2 (1984); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. at 836.

I also conclude that Burgos engaged in traditional protected concerted activity by filing the EEOC charge and discussing her workplace complaints with coworkers. Prior to filing the charge, Burgos and Thomas discussed their concerns about racial discrimination with Reverend

Tillman. The conversation included the possibility of the two filing EEOC charges. Thereafter, both Burgos and Thomas filed charges in the same month. Therefore, that conduct is protected. See *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820–822 (1994) (two employees engaged in protected concerted activity when, after discussing alleged racial discrimination in the setting of their wages rates, they individually filed charges with the Ohio Civil Rights Commission alleging such racial discrimination). Burgos and Thomas also shared work experiences the two believed were the result of racial discrimination, including mistreatment of them by supervisors and coworkers. This likewise constitutes traditional protected concerted activity. *Dearborn Big Boy No. 3*, 328 NLRB 705, 710 (1999) (employees who raised the possibility of racial discrimination in the nonhiring of another employee's daughter were engaged in protected concerted activity). Although the two never talked about group action, the discussion concerning working conditions is a necessary initial step in concerted activity. *Datapoint Corp.*, 246 NLRB 234, 235 (1979). Moreover, the discussions between Burgos and Thomas about racial discrimination are sufficiently linked to matters concerning the workplace and employees' interest as employees to constitute protected concerted activity. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014).[30]

C. Burgos' Statement that Hensley Must Contact the NAACP to Meet with Burgos Was Not Protected

However, I find that Burgos was not engaged in either *Interboro* or traditional protected concerted activity, when she stated that Hensley had to contact the NAACP if she wanted to have an appointment with Burgos.

By its plain text, the anti-discrimination provision in the collective-bargaining agreement prohibits the Respondent from discriminating with respect to employees' terms and conditions of employment based upon race. That provision cannot reasonably be read to create an employee right to insist on a representative of her own choosing being present for a meeting with a supervisor concerning work performance deficiencies, even where the employee previously had accused the supervisor of racial discrimination. Such an expansive reading of the text would run contrary to Board law and the collective-bargaining agreement. As to the law, this workplace is unionized, Burgos had a bargaining representative, and DriveCam event meetings could result in discipline. Against that backdrop, Burgos had a right to request union representation when meeting with Hensley and the Respondent would have been required to provide that representation. *YRC Freight*, 360 NLRB 744, 744–745 (2014); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Had Burgos requested a union steward for the meeting with Hensley,

[30] The record evidence is insufficient to demonstrate that Burgos' submission of the written complaints was traditional protected concerted activity. Burgos only described her personal problems therein and did not seek to initiate, induce, or prepare for group action. *Plumbers Local 412*, 328 NLRB 1079, 1082–1084 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). Her testimony did not establish that the written complaints were a byproduct of earlier discussions she had with Thomas or other employees. The evidence is insufficient to establish a link between those discussions and the written complaints Burgos submitted to the Respondent.

she obviously would have been provided one, since Hawkins was there and attended all the DriveCam meetings that day. However, Burgos was not entitled to insist on a nonunion representative to act as a witness. See, e.g., *Asset Protection & Security Services, L.P.*, 362 NLRB No. 72, slip op. at 4–6 (2015) (no *Weingarten* violation when employer denied employee's request to have another employee serve as a witness at an investigatory interview); *Consolidated Casinos Corp*, 266 NLRB 988, 1008 (1983) (employee's request that her personal attorney be present during an investigatory interview was not protected concerted activity or a *Weingarten* violation). As to the contract, the Respondent and the Union specifically negotiated, in Article 2, Section 6, an employee right to request a union official be present when the Respondent meets with the employee concerning discipline. Allowing a different representative, in addition to or to the exclusion of a union representative, would undermine the Union's status as the exclusive collective-bargaining representative. The importance of employees not acting in derogation of their union long has been recognized. *IBM Corp.*, 341 NLRB 1288, 1291–1292 (2004) (a union representative at an investigatory interview acts not only for the employee being interrogated, but also for all other employees in the unit); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 65–70 (1975) (employees who complained about employer's racial discrimination were not engaged in protected concerted activity, when they attempted to split off from their union and negotiate on their own with the employer over the issue). As a result, Burgos' instruction to her Supervisor Hensley to contact the NAACP to have an appointment with her was not *Interboro* protected concerted activity.

Burgos' demand for NAACP representation also was not traditional protected concerted activity. Relying on *Mike Yurosek and Son, Inc.*, 306 NLRB 1037 (1992) and *Every Woman's Place, Inc.*, 282 NLRB 413 (1986), the General Counsel argues that the demand was a logical outgrowth of her earlier protected conduct. I do not agree. In *Mike Yurosek*, four employees who individually refused to work overtime were engaged in protected concerted activity, because the conduct was a logical outgrowth of a group protest, only a few weeks earlier, concerning a supervisor's reduction in their work schedule. In *Every Woman's Place*, one employee's call to the U.S. Department of Labor concerning overtime compensation for holidays was protected concerted activity, because it was a logical outgrowth of a protest made by three employees, again several weeks earlier, to their supervisor over the same issue. These cases are inapposite to the situation here. Prior to December 30, Burgos' most recent protected activity as to racial discrimination was when she filed the EEOC charge on August 21. Her refusal to meet with Hensley without an NAACP representative occurred more than 4 months later. In the interim, Heath had met with Burgos in September to address her concerns and advised her she could have a union representative at any meeting with management. During that same time period, Burgos met with Hensley about DriveCam events on three prior occasions without incident. Burgos did not submit any additional complaints about racial discrimination in those 4 months, including on December 30. Thus, I cannot credit Burgos' testimony that she refused to meet with Hensley because of "ongoing issues" or because it "was my understanding that I wasn't supposed to come into contact with anybody that I had allegations against."[31] Burgos' refusal to meet with her supervisor was not a logical outgrowth of her earlier discrimination complaints.

[31] Tr. 84, 117–118, 123–124.

For all these reasons, I conclude Burgos' refusal to meet with Hensley without an NAACP representative was not protected. Accordingly, it is not necessary to apply *Atlantic Steel* and determine whether she lost the protection of the Act through her conduct on December 30. I reject the General Counsel's argument that the Respondent's asserted reason for discharging Burgos was protected concerted activity and its discharge of Burgos thereby violated Section 8(a)(1).

II. DID THE RESPONDENT'S DISCHARGE OF BURGOS VIOLATE SECTION 8(A)(1) UNDER *WRIGHT LINE*?

Under *Wright Line*, the General Counsel initially must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor for an employer's adverse action. In cases involving 8(a)(1) discipline, the General Counsel satisfies the initial burden by showing: (1) the employee's protected concerted activity; (2) the employer's knowledge of the concerted nature of the activity; and (3) the employer's animus. *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014); *Walter Brucker & Co.*, 273 NLRB 1306, 1307 (1984). As discussed above, I find that Burgos engaged in protected concerted activity by submitting written complaints about working conditions to the Respondent from January to August 2014; filing her EEOC charge in August 2014; and filing a grievance in November 2014. The Respondent was aware of the concerted nature of this activity, because it received the written complaints, EEOC charge, and grievance and because it was a party to the contract which contained the anti-discrimination, dignity and respect, and grievance provisions.

The major *Wright Line* dispute in this case is whether the Respondent harbored any animus towards Burgos' protected activity. Animus can be demonstrated by direct evidence or inferred from the totality of the circumstances. *Fluor Daniel, Inc.*, 311 NLRB 498, 498 (1993). A discriminatory motive may be established by a variety of circumstantial factors, including the timing of the employer's adverse action in relationship to the employee's protected activity, as well as whether the asserted reasons for the adverse action are a pretext. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *Shambaugh and Son, L.P.*, 364 NLRB No. 26, slip op. at 1 fn. 1 (2016). Pretext may be demonstrated by disparate treatment, shifting explanations, or an inadequate investigation into a discriminatee's alleged misconduct. *Affinity Medical Center*, 362 NLRB No. 78, slip op. at 1 fn. 4 (2015).

In this case, the evidence of the Respondent's animus to Burgos' protected activity is utterly lacking. After Burgos submitted her first two written complaints in January, Hart and a union representative met with her to discuss her issues with Dominguez. In April, the Respondent gave Burgos a performance award. When Burgos submitted two additional complaints in May and June, Heath met with her and Lomeli to resolve the situation. When she learned of the July 2014 posting of the 100 Riskiest Drivers' list with drivers' names showing, Heath immediately had the posting removed. In August, Burgos submitted her last two written complaints to the Respondent and then filed her EEOC charge. In response, the Company held a meeting in September with Burgos and multiple union representatives to discuss the issues

she raised. In that same meeting, Heath agreed to rescind the two attendance points the Respondent assessed Burgos on July 31 for a no-call/no-show. Heath also agreed to provide a union representative to Burgos, if she requested it, for ostensibly any meeting Burgos had with management. That goes well beyond any legal requirement the Respondent had pursuant to *Weingarten* or the collective-bargaining agreement. On October 1, the Respondent gave Burgos a safe driving award. Then in November after a grievance was filed, Heath agreed to reduce the initial discipline to Burgos for violating the cell phone use policy from a 3-day suspension to a verbal warning. (The General Counsel did not allege this discipline as being unlawful.) Any hostility on the Respondent's part to Burgos' protected activity is absent from these facts.

The General Counsel relies on timing, disparate treatment, the lack of an investigation into Burgos' conduct, and shifting defenses to establish the required hostility. None of these contentions withstands close scrutiny. First, timing actually supports the Respondent's case. Burgos' first written complaint was in January, almost a year prior to her discharge, and her EEOC charge filing was in August, more than 4 months prior to her discharge. Even Burgos' grievance filing on November 11 was nearly 2 months prior to her discharge. Animus cannot be presumed with such a significant time gap between protected activity and an adverse action. See, e.g., *Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (2 months between union activity and warning was too remote in time to show animus); *Laidlaw Environmental Services*, 314 NLRB 406, 406 fn. 1 (1994) (antiunion statement made to employee 7 to 8 months prior to his suspension was too remote in time to show animus).

Second, the General Counsel has not established disparate treatment. Although the Respondent never previously discharged anyone due to insubordination, it also never encountered an employee who refused to meet with a supervisor. Moreover, the General Counsel did not elicit any testimony from Burgos, Thomas, or another employee of coworkers who were insubordinate or did not follow supervisory instructions, yet were not disciplined. Relying on certain testimony from Hensley, the General Counsel argues that the Respondent did not discipline other employees who failed to return to the yard when called.[32] However, the argument is not substantiated by that testimony. Hensley stated that sometimes drivers miss a message to meet with her at the start of their shifts and instead meet with a road supervisor at the end of their shifts. But that does not establish disparate treatment, because Burgos did not miss a message. Rather, she received the message to meet with Hensley three times and failed to follow the instruction three times. The record contains no incident of a similar nature that the Respondent tolerated. See, e.g., *NACCO Materials Handling Group, Inc.*, 331 NLRB 1245, 1246 (2000) (essential ingredient of disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee); *Waste Management of Arizona, Inc.*, 345 NLRB 1339, 1341 (2005) (no disparate treatment found where General Counsel did not show that the employer tolerated behavior comparable to the discriminatee's). Beyond that, the Respondent's discharge of Burgos for insubordination conformed to the parties' contract, because insubordination was included in the serious infractions listed therein which warranted immediate discharge.

[32] Tr. 356–57, 365–366.

Third, the Respondent's investigation into Burgos' conduct was not inadequate. Rather, it followed the procedure contained in the collective-bargaining agreement to a T. The infraction occurred on the morning of December 30. Almost immediately thereafter, Heath listened to the audio of the communication between Burgos and Ming. She also obtained the written statements of Hensley, Ming, Garcia, and Newman. On December 31, Heath issued the NOI to Burgos and also provided a copy to the Union. Thus, as required by the contract, the Respondent provided the written description of the allegations against Burgos and did so within 5 days of the infraction. The Respondent scheduled the disciplinary hearing, with the consent of the Union, for January 2, 2015, again within the timeframe specified by the agreement. Burgos attended the hearing. At the end of the hearing and as required by the contract, the Respondent issued its written conclusion to "[s]eparate employment based upon insubordination and unmanageable employee." In addition to complying with all contractual requirements in its investigation, the Respondent also provided Burgos with the opportunity to explain her conduct in the disciplinary hearing. She declined to do so. Providing such an opportunity to explain alleged misconduct runs contrary to the contention the Respondent's investigation was inadequate. *Diamond Electric Manufacturing Corp.*, 346 NLRB 857, 860 (2006).

Fourth, I do not agree that the Respondent has put forth shifting defenses for discharging Burgos. The NOI, written conclusion at the end of the disciplinary hearing, and employee separation report all listed Burgos' insubordination on December 30 as the reason for the discharge. They all described the insubordination as Burgos' refusal to meet with Hensley. That was the sole reason the Respondent discharged her. As discussed above, I credit Heath's explanation that she wrote "unmanageable employee" on the disciplinary hearing conclusion form because Burgos would not explain her conduct during the hearing, but the failure to explain her conduct did not factor into the discharge decision. Furthermore, I do not view Heath's reference in the employee separation report to Burgos' November refusal to meet with her as a shifting defense. Rather, it simply further elucidated the nature of Burgos' insubordination, since she had been put on notice more than once prior to December 30 of the need to meet with management about work when requested. The comments are part and parcel of the same insubordination offense. See, e.g., *NAACO Materials Handling Group*, 331 NLRB at 1246; *River Ranch Fresh Foods, LLC*, 351 NLRB 115, 116–117, 117 fn. 13 (2007).

For all these reasons, I conclude the General Counsel has not carried the initial *Wright Line* burden, because the record evidence fails to demonstrate the Respondent's animus towards Burgos' protected concerted activity. As a result, the General Counsel has not established that the Respondent's discharge of Burgos violated Section 8(a)(1).

Even if the initial burden had been met, I conclude the Respondent satisfied its shifting *Wright Line* burden by showing it would have discharged Burgos absent her protected concerted activity. Burgos' conduct on December 30 was insubordination, as the Respondent and Union defined it in the contract. Meeting with one's supervisor to discuss work is one of the most basic job functions of any employee. Here, dispatchers informed Burgos three times in the span of roughly 30 minutes that she needed to meet with Hensley, her supervisor. She was

informed during the last notification that refusing to do so may be insubordination. Burgos refused to comply with the instructions and instead left work. Given the Respondent's practice of having dispatchers notify employees of required meetings with supervisors, this certainly constituted "the refusal and/or failure to follow a direct order." *U.S. Postal Service*, 350 NLRB 441, 445 (2007) (repeated refusal by employee to comply with supervisory instruction was insubordination). In effect, Burgos' demand for an NAACP representative to meet with Hensley was an attempt to remain on the job and determine for herself which terms and conditions of employment she would observe. This also constitutes insubordination. *Interlink Cable Systems*, 285 NLRB 304, 306–307 (1987).

The General Counsel attempts to justify Burgos' conduct by noting the Respondent did not tell Burgos the purpose of the meeting with Hensley, or advise her that a union steward was present. But the manner in which Hensley and Ming communicated with Burgos that day conformed to the Respondent's established practice. Dispatchers instructed Burgos multiple times prior to December 30 that she needed to meet with Hensley and Burgos complied with those instructions. Indeed, after filing her EEOC charge, Burgos already had met with Hensley three times concerning DriveCam events, all without incident. Furthermore, the Respondent had no obligation, under the contract or legally, to inform Burgos what the meeting was about or whether a union steward would be present. Burgos herself could have requested a union steward, but did not do so. She also could have inquired what the meeting was about, but again did not so. The reason for the lack of inquiry is apparent. Based on the past practice, Burgos knew or should have known why Hensley wished to meet with her and that a steward would be available for the meeting.

The Respondent had the authority pursuant to the parties' contract to discharge an employee for the first offense of insubordination. It also demonstrated at the hearing that it never before encountered conduct like that for which it discharged Burgos. While Burgos engaged in protected activity, the record evidence establishes that the Respondent would have discharged her for insubordination, irrespective of her protected activity. *America's Best Quality Coatings Corp.*, 313 NLRB 470, 486–487 (1993) (employee who raised possible racial discrimination in granting of raises to employer was engaged in protected concerted activity, but employer lawfully discharged him for confrontation with a supervisor 2 months later).

III. DID THE RESPONDENT'S DISCHARGE OF BURGOS VIOLATE SECTION 8(A)(3)?

The General Counsel's complaint also alleges the Respondent's discharge of Burgos violates Section 8(a)(3), because it was motivated by her union activities. This allegation likewise must be evaluated under the *Wright Line* standard. I similarly conclude the General Counsel failed to meet the initial *Wright Line* burden for this allegation. Union activity and knowledge of the activity are not in dispute, although the level of Burgos' union activity certainly was limited. In August, the Union notified the Respondent that Burgos was a steward-in-training. However, neither she nor the Union ever went forward with her training and Burgos did not engage in any representational duties. In November, the Union filed a grievance on Burgos' behalf to contest her 3-day suspension for a violation of the Respondent's

cell phone policy. As to animus, the General Counsel makes the same arguments regarding the Respondent's hostility towards Burgos' union activity that were made as to her protected concerted activity. For the same reasons discussed above, I find the Respondent did not harbor any animus towards Burgos' extremely limited union activity. I further note that the facts of this case are indicative of a positive employer-union relationship. The resolution of Burgos' November grievance is an example of that positivity. Heath agreed to reduce her 3-day suspension to a verbal warning, despite the cell phone policy indicating a 3-day suspension would result from the first violation. Even more telling is that the Respondent reinstated Burgos to her job as a resolution to the Union's grievance over her discharge. Accordingly, I find that the Respondent's discharge of Burgos likewise did not violate Section 8(a)(3).[33]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) or 8(a)(3) by issuing a notice of infraction to and suspending Lanita Burgos on December 31, 2014, or by discharging Burgos on January 2, 2015.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., May 24, 2018.

Charles J. Muhl
Administrative Law Judge

[33] The Respondent did not assert an affirmative defense in its answer that deferral to the grievance settlement over Burgos' discharge was warranted. The Respondent also made no argument in its brief in this regard. Therefore, I find the Respondent has waived the deferral defense and I do not consider deferral on the merits. *SEIU United Healthcare Workers-West*, 350 NLRB 284, 284 fn. 1 (2007).

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.